Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/09042/2019**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC **Decision & Reasons Promulgated**
Heard On: 27th October 2020 **On: 30th October 2020**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Geoffrey Mervin Fernando
(no anonymity order made)

Appellant

And

Entry Clearance Officer (Sheffield)

Respondent

For the Appellant: **Mr Briddock, Counsel instructed by Light House Solicitors**
For the Respondent: **Mr A. Tan, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Sri Lanka date of birth 12th November 1980. He seeks entry clearance to be able to settle in the United Kingdom with his wife, Mrs Kowshika Thiruvilangam.

2. The Respondent accepted that the Appellant is in a genuine and subsisting relationship with Mrs Thiruvilangam, that he met the English language requirements and that the household income was in excess of the 'minimum income requirement'. The application was nonetheless refused. The Respondent

found that the Appellant had previously spent a period of time in the United Kingdom without leave to do so; he had failed to report as required and had been listed as an absconder. As such his application fell to be refused with reference to paragraph 320(11) of the Immigration Rules.

3. By its decision dated the 3rd February 2020 the First-tier Tribunal (Judge Chana) agreed and the appeal was dismissed. The Appellant was granted permission to appeal to this Tribunal on the 18th May 2020.

Error of Law: Discussion and Findings

4. Paragraph 320(11) is one of the 'General Grounds for Refusal' found at part 9 of the Immigration Rules. It reads:

> **Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused**
>
> …
>
> (11) where the applicant has previously contrived in a significant way to frustrate the intentions of the Rules by:
>
> (i) overstaying; or
>
> (ii) breaching a condition attached to his leave; or
>
> (iii) being an illegal entrant; or
>
> (iv) using deception in an application for entry clearance, leave to enter or remain or in order to obtain documents from the Secretary of State or a third party required in support of the application (whether successful or not);
>
> **and there are other aggravating circumstances**, such as absconding, not meeting temporary admission/reporting restrictions or bail conditions, using an assumed identity or multiple identities, switching nationality, making frivolous applications or not complying with the re-documentation process.
>
> (emphasis added).

5. Paragraph 320(11) does not mandate that applications by former overstayers are rejected: it prompts the decision maker to conduct a three stage enquiry. First, has the individual contrived in a significant way to contravene the rules, for instance by overstaying. Second, are there aggravating circumstances: the rule provides a non-exhaustive set of examples, which vary in severity from breaching reporting conditions to the use of multiple identities. In PS (paragraph 320(11) – discretion – care needed) India v Secretary of State for the

Home Department [2010] UKUT 440 (IAC) the Tribunal pointed to the public policy aims underpinning this second question. It is in the public interest that overstayers are encouraged to regularise their positions. It is in the public interest – as reflected in Appendix FM – that if they wish to do so by reference to their Article 8 rights they should do so by first returning to their country of origin and making an application for entry clearance in the ordinary way. It might not be in the public interest however, to recognise Article 8 rights of such immigration offenders where the breaches were flagrant or, in the words of the Tribunal "*truly* aggravating" [at §14]. If the decision maker finds that both of these initial tests are met, he or she must finally consider whether, the presumption of refusal notwithstanding, the Article 8 rights of the subject should nevertheless prevail.

6. In this case there was no issue about the first question. The Appellant undoubtedly remained in the United Kingdom without leave after his asylum application was rejected.

7. The Entry Clearance Officer considered that the second test was met because the available records showed that the Appellant had failed to report when required: on the facts this does not appear to be in issue, as it is certainly not suggested on the part of the Appellant that he had maintained contact with the Home Office in the 9 years that he remained here without leave. The First-tier Tribunal rejected the ECO's view on this point: at its §28 it found that "absconding and overstaying in themselves may not be considered aggravating circumstances". In the absence of any evidence or particulars from the ECO I am satisfied that this was a finding open to the Judge. One can envisage a case where an applicant persistently sought to evade the immigration authorities or breached the terms of his bail and this could amount to "truly aggravating" circumstances, but in a case such as this it is hard to separate the act of absconding itself from the overstaying – by their nature one must be preceded by the other. One failure to report and 'going to ground' cannot logically be said to be aggravating since that in itself amounts to overstaying.

8. Having rejected the Respondent's case the Tribunal did not however stop there. It found reasons of its own to consider that the Appellant's behaviour was truly aggravating. At its §28 the Tribunal finds that the length of time that the Appellant spent in the UK brings his case "within the ambit" of the rule. That proposition finds no support in either the rules or published policy. Nowhere is it said that the length of time that a person spends living without leave might be relevant to this enquiry. Had the rule intended to create a 'cut-off' period of time below which overstaying would be overlooked, but beyond which it would be fatal to any future application, it would have said so. The illogicality of the Tribunal's conclusion is further illustrated by paragraph 276ADE(1) (iii). This provides that overstayers who remain in the United Kingdom for *twenty* years are permitted to remain indefinitely on the basis of their *private* life rights, yet here the Tribunal has concluded that a far shorter period of overstaying is sufficiently aggravating to justify interference with *family* life rights.

9. The second reason found by the Tribunal to amount to aggravating circumstances is set out at its §29:

> "The other aggravating circumstance is that the appellant made an application for asylum based on his Tamil ethnicity but returned voluntarily to Sri Lanka, in order to marry and make an application for entry clearance. This demonstrates to me that he made a frivolous application for asylum…"

10. The Appellant, a Tamil, arrived in this country to seek protection on the 10th May 2009. On the day that he claimed asylum the war against the Tamil Tigers was reaching its climax, with what the UN described as the "large scale killing of civilians" in full swing. It is unclear to me whether Judge Chana had before her the findings of the Tribunal which dismissed the Appellant's asylum appeal in June 2010, but against the country background it seems unlikely that it would have been described as "frivolous". It was not a claim that was for instance certified as manifestly unfounded; nor was it one of many, or one plainly made to frustrate removal, all of which might be claims that could properly be described as frivolous. Not being entitled to asylum is not the same as making a frivolous application. Nor does the fact that the appellant chose to voluntarily return to Sri Lanka some ten years later render the original application so.

11. For the foregoing reasons I am satisfied that in its consideration of the second limb of the 320(11) enquiry the Tribunal erred in taking immaterial matters into account and erring in fact. It follow that I need not address those grounds which challenge the First-tier Tribunal's approach to the final question raised under 320(11) – whether it was proportionate to refuse entry to the husband of a British national who meets all of the substantive requirements of the rules because nine years ago he became an overstayer.

The Re-Made Decision

12. I therefore proceed to remake the decision in the appeal. I invited Mr Tan to address me on what the truly aggravating matters might be in this case. He revived the original ground for refusal, discounted by Judge Chana: the fact that the Appellant failed to report. As I note above, it cannot be said that any failure to report, or any period of absconding, will necessarily elevate the circumstances beyond simply overstaying. It is for the Respondent to demonstrate that in this case the breach was of sufficient severity to warrant refusal under 320(11). The Respondent's bundle contains a letter from the government department then known as the United Kingdom Border Agency. It is addressed to Mr Fernando at an address in Salford, and informs him that he has failed to report as required to Dallas Court enforcement office on the 2nd July 2009. The letter itself is dated the 4th July 2009. That is the only actual evidence of the breach. What is striking about this is that it would appear that if Mr Fernando did then abscond, he cannot have done so for very long, since his asylum claim was at that stage outstanding, and as far as I am aware, was not

refused for non-compliance with the process. Indeed, we know that Mr Fernando was still engaged in the system because the following year he appealed the eventual refusal of his claim to the First-tier Tribunal, his case being dismissed on the 10th June 2010. Mr Tan tells me that the dates given in the refusal notice – that the period of absconding began on the 23rd July 2010 – are taken from the central electronic record that he had before him during our remote hearing. I have no reason to doubt that – it seems logical that once someone is deemed 'appeal rights exhausted' as Mr Fernando would have been some six weeks after his appeal was dismissed, that they would be so recorded.

13. I proceed on the basis that on one occasion in July 2009 the Appellant failed to report at Dallas Court. I have to assume that this failure was resolved at the time to the satisfaction of the Secretary of State because there is no indication that the was thereafter detained or otherwise penalised. I know that he was back in contact with the Secretary of State by the following April because this was when he received the notification that his asylum claim had been rejected and lodged his appeal. I therefore attach little weight to this failure to report. Although I have no evidence that this is the case I am also prepared to proceed on the basis that after the Appellant lost his appeal he 'went to ground' and the Home Office listed him as an absconder. I am not satisfied that this is behaviour that brings him within the ambit of "aggravating circumstances": much like the illegal working considered by the Court of Appeal in ZH (Bangladesh) v Secretary of State for the Home Department [2009] EWCA 8 disappearing from view is part and parcel of such overstaying.

14. If I am wrong and it should be considered aggravating, considering all of the circumstances I am nevertheless satisfied that it would today be disproportionate to refuse entry clearance to a husband who wishes to settle in the United Kingdom with his British wife, and who is otherwise able to meet all of the substantive requirements of Appendix FM. The 'aggravating' feature here relates to a decision made in 2009 when the Appellant had not yet met his wife. Once he met her, he did what must be recognised as the right thing: he returned to Sri Lanka in order to take his place in the queue of family members seeking entry clearance. This decision amounts to a lack of respect not just for his family life, but for hers. The effect of this decision would be that his sponsor wife is punished for a decision her husband made long ago. She would be asked to give up the totality of her life in this country because of that choice that he made. His was not a heinous, persistent or flagrant breach. In all of the circumstances I am satisfied that the impact of this decision upon the parties would be unjustifiably harsh.

Decisions

15. The decision of the First-tier Tribunal contains errors of law such that it must be set aside in its entirety.

16. The decision in the appeal is remade as follows: the appeal is allowed on human rights grounds.

17. There is no order for anonymity.

Upper Tribunal Judge Bruce
Date 27th October 2020